Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1511 OF 2007

Bhupendra M. Shah .
Age: 42 yrs., Occ.: Business, .
R/at.: 2, Big Splash, Sector No.12, .
Vashi, New Bombay ...Petitioner

V/s.

1. Hemraj Premaji Gada .
   Age: 68 yrs., Occ.: Shop Merchant, .
   R/at: B/11, Ashok Samrat, .
   Daftary Road, Malad (East), Mumbai .

2. The State of Maharashtra ...Respondents

Mr.S.V. Marwadi, Advocate, for the Petitioner.

Mr.Rakesh K. Agrawal h/f. Mr.M.P. Vashi & Associates, Advocate, for Respondent No.1.

Mr.S.R. Shinde, APP, for the Respondent-State.

CORAM : A.P. DESHPANDE, J.

DATED : 21ST NOVEMBER, 2007.

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of the parties.

2. The petitioner is an accused in Case No.1034 of 2005 filed by respondent No.1 for an offence under Section 13 of the Maharashtra Ownership of Flats Act read with Section 406 of the I.P.C. The petitioner was running business in the name and style of 'Kasturi Builders' and according to the complainant had agreed to sell a flat of an area of 3,000 sq.feet for a

consideration of Rs.18,00,000/-. The respondent allegedly paid a sum of Rs.6,00,000/- towards part consideration. After filing of a complaint by the respondent, the Magistrate recorded verification statement and passed an order of issue process against the petitioner.

3. The respondent on 4th February, 2006 filed an application purportedly under Section 93 and 94 of the Cr.P.C. before the Magistrate for issuing search warrant against the accused. The Magistrate issued the search warrant. Being aggrieved by the said order, the petitioner filed Criminal Revision Application No.72 of 2007. The Court of Sessions by an order dated 13th July, 2007 rejected the Criminal Revision Application and being aggrieved thereby the present Criminal Writ Petition has been filed. The material averments made by the respondent in the application filed under Section 93 and 94 of the Cr.P.C. reads thus :-

> "the accused has an office at D-2, "Big Splash" building, Sector 17, Vashi, New Bombay. The accused is not likely to produce the books of accounts, pass books, cheque books and

other documents. To prove the allegations, it is necessary that the books of accounts, cheque books, pass books etc. maintained by the accused should be available at the time of the trial. It is, therefore, necessary to issue a search warrant to search the premises of the accused and to seize the following documents :-

(a) Books of Accounts; (b) Receipt Books; (c) Cheque Books; (d) Pass Books; (e) List of persons who booked the flats in the said building."

4. It is thus clear that the respondent had made a specific prayer in relation to definite documents which are said to be in possession of the accused and the search of the premises of the accused is asked for. The Magistrate by a cryptic order allowed the application and directed to issue search warrant against the accused relating to documents at Nos.1 to 5 mentioned in para 6 of the application.

5. The learned Counsel appearing for the petitioner has made the following submissions :-

(a). That Sections 91 and 93 constitute a complete Court in itself.

. Section 91 authorises any Court or any officer in charge of a police station, when it is considered that production of any document or thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it.

. Section 93 empowers the Court to issue search warrant when the Court has reason to believe that a person to whom a summons or an order under Section 91 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition may issue a search warrant. The submission is that reference to "any person" appearing in Section 91 and Section 93(1)(a) does not include an accused and hence

the search warrant issued for carrying out search of the premises of the accused for seizure of the documents from possession of the accused cannot be sustained under Section 93(1)(a) of the Code of Criminal Procedure.

(b). It is submitted that an order of search has serious repercussion as it adversely affects the social status of a person and hence such an order should not be made lightly and need to be passed after recording reasons in support of the order. According to the learned Counsel, the impugned order passed by the Magistrate does not record reasons for taking recourse to Section 93(1)(a) and hence the order is unsustainable in law.

6. In support of the first submission, the learned Counsel appearing for the petitioner has placed a reliance on a judgment of the Supreme Court in the case of V.S. Kuttan Pillai V/s. Ramakrishnan and Anr. reported in 1980 (1) SCC 264. The said judgment, after noticing the law laid down by the majority judgment of the Constitution Bench of the Supreme Court in case of State of Gujarat V/s.

Shyamlal reported in AIR 1965 SCC 1251, has observed thus at the conclusion of paragraph 8 :-

> "whatever that may be, it is indisputable that according to the majority opinion the expression 'person' in Section 91(1), (new Code) does not take within its sweep a person accused of an offence which would mean that a summons issued to an accused person to produce a thing or document considered necessary or desirable for the purpose of an investigation, inquiry or trial would imply compulsion and the document or thing so produced would be compelled testimony and would be violative of the constitutional immunity against self- incrimination".

. The judgment then observed in paragraphs 10 and 11 thus :-

> "10. In view of the decision in Shyamlal Mohanlal case one must

proceed on the basis that a summons to produce a thing or document as contemplated by Section 91(1) cannot be issued to a person accused of an offence calling upon him to produce document or thing considered necessary or desirable for the purpose of an investigation, inquiry, trial or other proceeding under the Code of Criminal Procedure.

11. If summons as hereinbefore discussed cannot be issued to an accused person under Section 91(1), ipso facto a search warrant contemplated by Section 93(1)(a) cannot be issued by the Court for the obvious reason that it can only be issued where the Court could have issued a summons but would not issue the same under the apprehension that the person to whom such summons is issued will not or would not produce the thing as required by such summons or requisition. A search warrant under Section 93(1)(a) could only be

> issued where a summons could have been issued under Section 91(1) but the same would not be issued on an apprehension that the person to whom the summons is directed would not comply with the same and, therefore, in order to obtain the document or thing to produce which the summons was to be issued, a search warrant may be issued under Section 93(1)(a).

7. Section 93 envisages situations other than the one contemplated by Section 93(1)(a) for issuance of a search warrant. Section 93(1)(b) permits issuance of a search warrant when the Court does not know where such document or thing is or is not known of the fact as to in whose possession the document or thing is. This is obviously not the situation obtained in the present case in as much as the complainant has categorically stated that the documents are in custody and possession of the accused. Hence sub-section (b) has no application.

8. The last situation is covered by sub-section (c) and it postulates that where the Court considers that the purpose of any inquiry, trial or other

proceeding under this Code will be served by a general search or inspection, it can issue a search warrant. This as well is not the situation in the present case in as much as there is no general search or inspection ordered by the Trial Court. A specific order of search has been passed against the accused and the direction is to search the premises of the accused and seize definite documents that are in possession of the accused. It is thus clear that the situation in the case in hand is not even referable to Section 93(1)(b) or (c), but is squarely referable to Section 93(1)(a) of the Code. If the search warrant is referable to Section 93(1)(a), then in view of the judgment of the Supreme Court, no search warrant under Section 93(1)(a) can be issued against an accused.

9. In this view of the matter, I have no difficulty in concluding that the order passed by the Magistrate issuing search warrant against the accused, with a view to have the premises of the accused searched, is unsustainable in law. Hence the first contention of the learned Counsel for the accused need to be accepted. The next submission is also well merited in as much as the impugned order passed by the Magistrate does not record reasons in support of the order. The impugned order passed by the Magistrate is

cryptic besides being unreasoned.

10. The revisional order passed by the Sessions Court also does not deal with the contention raised by the petitioner in its proper perspective. In the result, the Writ Petition deserves to be allowed and I proceed to allow the same. The impugned order passed by the J.M.F.C. Vashi in Case No.R.C.C. 1034/2005 dated 13-3-2007 so also the order passed by the Additional Sessions Judge, Thane in Criminal Revision Application No.70/2007 dated 13-7-2007 dismissing the revision application filed by the petitioner are quashed and set aside. Rule is made absolute in above terms with no orders as to costs.

A.P. DESHPANDE, J.